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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 31.

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF OF APPELLANT.

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The briefs filed by the appellees fail to deal in any serious way at all with the merits of this case. Instead they continue their tactics of searching for ways to convince the Court to avoid the constitutional issues here. Perhaps no reply is due to these efforts, but appellant wishes to leave no stone unturned in his quest for vindication and therefore offers the following further comments on three questions raised by the appellees.

I. THE QUESTION OF MOOTNESS.

Appellees suggest this case is moot for two reasons:

(1) Since the November 5, 1968, election has been held, this Court is unable to give appellant the specific relief he sought at the time the suit was filed, and

(2) The seven percent requirement for independent candidates contained in Section 3513.257, Ohio Revised Code, is no longer the law in Ohio. The

legislature has reduced the requirement to four percent.

The first of these arguments was anticipated and treated by appellant in his brief-in-chief (see pp. 24-26). Any remaining doubt on the subject should be dispelled by this Court's holding in *Moore v. Ogilvie*, ____ U.S. ____, 23 L.Ed.2d 1, 5 (1969):

> Appellees urged in a motion to dismiss that since the November 5, 1968, election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over the burden * * * allowed to be placed on the nomination of nominees for statewide offices remains and controls future elections * * *. The problem is therefore "capable of repetition, yet evading review * * *." The need for its resolution thus reflects a continuing controversy in the federal-state area where our "one man—one vote" decisions have thrust. We turn then to the merits.

Appellees' other claim of mootness is founded on an irrelevancy. The action taken by the Ohio legislature [1] does not affect the question posed here. *The issue is whether any percentage requirement for independents in excess of one percent abridges their constitutional rights.* In his petition for a writ of mandamus filed with the Court of Common Pleas of Cuyahoga County, appellant asked that his name be placed on the ballot on the basis of having satisfied the former *one percent requirement*. (See paragraph 14 of petition, paragraph 2 of prayer; Appendix, p. 6.) The Court declined to grant the writ. The question posed for review is whether the trial court's action was proper.

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[1] The legislature acted only after this Court assumed jurisdiction of the subject case.

The towering constitutional question is and has been from the inception of this case whether the one percent standard, viewed in the light of the State's experience under that standard, constitutes a *ceiling* above which the State may not go. It is apparent that if this Court answers that question in the affirmative, any statute requiring a higher percentage, *whether four or seven,* is unconstitutional and void. Thus despite the Legislature's action, the issue remains precisely what it was before and is in no way rendered moot.

Furthermore, this case is not one in which changes in the applicable state law intervening between decision by the highest state court and decision by this Court cast upon this Court the burden of settling state as distinct from federal questions. Cf. *Bell v. Maryland,* 378 U.S. 226 (1964). The only questions raised here are federal questions. The Ohio Supreme Court refused to grant review on the ground that "no substantial constitutional question exists herein." To remand the case to that court now would be an exercise in futility. This is not a matter of "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall,* 117 U.S. 241, 251 (1886). The Ohio Supreme Court has previously declined to render a judgment in this case, at least on the merits, and there is no basis for asking it to do so now. If that Court did not deem the seven percent statute a substantial violation of appellant's constitutional rights, it will not, *a fortiori,* entertain jurisdiction and hear a challenge to a four percent law.

In *Ashcraft v. Tennessee,* 322 U.S. 143, 156 (1944), the Court said:

> In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court

is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Patterson v. Alabama,* 294 U.S. 600, 607; *State Tax Commission v. Van Cott,* 306 U.S. 511, 515-516.

Justice here requires a disposition now of appellant's claim and a holding that Ohio cannot constitutionally compel independents to secure signatures numbering more than one percent in order to qualify for the ballot. To hold otherwise would mean:

1. The four percent statute would be validated, at least for purposes of the next election.

2. New litigation would have to be filed challenging the four percent provision and, based on previous experience in the state courts, the long climb up the appeal ladder would have to be made once again.

3. The question raised by appellant as to whether he should have been certified for the ballot as a result of having filed valid signatures numbering more than one percent—*but less than four percent*—would remain unanswered.

4. A problem not only "capable of repetition," *Moore v. Ogilvie, supra,* but inevitably recurring would remain unresolved.

5. An "obvious pretense" "to avoid facing the constitutional question," *Bell v. Maryland, supra* at 243, Douglas, J., concurring would be judicially approved and a harmful precedent set. A future challenge to the four percent statute if it reached this Court in another two years, could be obviated again by the simple expedient of the legislature's adopting a 3.5% classification for independents. A restoration of Ohio's one percent law could thus be delayed indefinitely.

6. An onerous and unfair burden would be placed on this appellant who has diligently prosecuted his appeal through four courts.

Experience has amply proven that the Ohio legislature, if left to its own devices, will not accord independent candidates the rights guaranteed them by the United States Constitution. Acting under the compulsion of the holding in *Williams v. Rhodes*, 393 U.S. 23 (1968), the Ohio legislature did enact new legislation supposedly permitting third political parties to qualify for ballot position. But this new legislation is as constitutionally infirm as was the old. A new political party in Ohio must now gather *seven percent* of the total vote cast for governor or approximately 200,000 valid signatures. *This is by far the highest requirement in the nation!*

The failure of the legislature to permit independents and new political parties to qualify on a one percent basis underscores the imperative need for judicial guidelines and the establishment of ceilings. The alternative is endless delay in securing rights for those of an independent persuasion:

> [A]ny deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. (Emphasis by the Court.)
>
> *Watson v. Memphis*, 373 U.S. 526, 532-533 (1963).

There is no "overwhelmingly compelling reason" to perpetuate Ohio's discriminatory and burdensome election laws, even in their amended form. The election process

is too vital a part of our democratic system to permit delay in removing undue obstacles.

This Court is respectfully urged to reject the suggestion of mootness, to decide this case on the merits, and to hold that Ohio may not abrogate the rights of independent political candidates by requiring them to obtain more signatures that were previously required by the one percent statute in order to secure a place on the ballot.

II. THE QUESTION OF WHERE THE BURDEN OF PROOF LIES.

In their brief the appellee members and director of the local Board of Elections again dispute where the burden of proof lies in this case and what material the court may consider in deciding the case.

Appellant, of course, has shown without contradiction that he satisfied the constitutional requirements for the office he sought and that he had secured sufficient signatures to satisfy the former law. In this posture and where a claim is made that the state law violates the Equal Protection Clause:

> [W]e must consider the facts and circumstances of the law, *the interests which the state claims to be protecting*, and the interests of those who are disadvantaged by the classification. (Emphasis added.)
>
> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

In other election cases the Court has held that:

> [i]t was the burden of the State "to present * * * acceptable reasons for the variations among the populations of the various * * * districts * * *."
>
> *Kirkpatrick v. Preisler*, ____ U.S. ____, 22 L.Ed.2d 519, 526 (1969).

See also: *Wells v. Rockefeller*, ____ U.S. ____, 22 L.Ed.2d 535, 538 (1969).

III. THE QUESTION OF THE PROTECTIONS DUE INDEPENDENT CANDIDATES.

The appellees hint that independent candidates are entitled to less protection than that given to party candidates. There are several answers to these contentions.

First, this Court has recently said that independent candidate procedures are subject to constitutional scrutiny:

> The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. * * * All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote.
>
> *Moore v. Ogilvie*, ____ U.S. ____, 23 L.Ed.2d 1, 6 (1969).

Second, it is clear that our constitution is neutral on the existence of political parties. Nothing in it entitles them to special treatment. In point of fact, it seems that the framers did not anticipate the development of political parties. Beveridge says:

> In this rise of political parties the philosophy of the Constitution was negatived; for our fundamental law, unlike those of other modern democracies, was built on the non-party theory and did not contemplate party government. Its architects did not foresee parties. Indeed, for several years after the Constitution was adopted, the term "party" was used as an expression of reproach. The correspondence of the period teems with illustrations of this important fact.
>
> Beveridge, *The Life of John Marshall*, Vol. II, p. 75 (1916).[2]

Third, the fact that party primaries are sometimes rigorous contests is irrelevant as to whether an independ-

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[2] See also: *1787 The Grand Convention*, Clinton Rossiter, The Macmillan Company, New York, 1966 at pp. 312-313.

ent should be allowed on the ballot. Candidates enter party primaries because the prize of party label and support is worth having in an election. This is what makes the contest—nothing required by the Constitution.

Finally, even if the Court should decide that an independent candidate for political office may be subjected to a higher signature requirement to qualify for the ballot than the party candidate, the question remains: How much higher?

It is clear that in such a situation an "exacting standard" is applied to determine whether the "requirements do in fact sufficiently further a compelling state interest to justify denying" ballot position to appellant and other independent candidates. *Kramer v. Union Free School District*, ____ U.S. ____, 23 L.Ed. 583, 593 (1969).[3] It is certain that this is not the case here. Both the 7% standard and the 4% standard are far in excess of the needs of any valid state interest.

CONCLUSION.

The appellees have once again refused to squarely join the constitutional issues here. They urge the Court to leave political independents in limbo unable to exercise what should be the elemental constitutional right to seek political office.

Respectfully submitted,

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[3] From appellant's standpoint the reduction to 4% is scant improvement. In 1968 he would have needed 3414 signatures, a number much in excess of the 899 he did obtain. The candidate in Ohio's 22nd Congressional district would have needed 5874 signatures in 1968. Party candidates qualify with 100 signatures. Section 3513.05, Ohio Revised Code.